YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by THE YALE LAW JOURNAL COMPANY, INC. P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

ORAL GIFT AS A DEFENSE IN AN ACTION OF EJECTMENT UNDER THE CODE

A recent Minnesota case,[1] following a doctrine enunciated in previous decisions in that state,[2] represents an interesting development in procedure under the code accompanied by a change in substantive law. The plaintiff placed his son in possession of a farm in 1911, and promised to give him the land later by deed or by will; the evidence is conflicting as to the exact nature of the promise, if any. The son married in 1913, remained in possession of the land, cultivated the soil, built a house, and made other substantial improvements in reliance upon the gift. He died in 1915 and the plaintiff brought an action of ejectment

[1] *Lindell v. Lindell* (1917) 160 N. W. (Minn.) 1031.

[2] The doctrine is fully set out in *Hayes v. Hayes* (1914) 126 Minn. 389. A dictum is found in *Trebesch v. Trebesch* (1915) 130 Minn. 368.

against the widow. The defendant, the widow in possession, pleaded in defense that she had title to the land in question by virtue of the oral gift, now completely executed. The jury found that there was an oral gift, accompanied by a promise to convey the land by deed or will. The court thereupon held that the defendant had presented a good defense, and that the action of ejectment could not be maintained.

We must first consider the nature of the problem involved in the case. Ordinarily, when a donee of an oral gift has gone into possession of the land and made substantial improvements[3] in reliance upon the gift, the problem has been considered primarily one under the Statute of Frauds.[4] It has become well established through a long line of decisions in England and America that the taking of possession of the land by the donee, followed by a sufficient change of position, as manifested by the making of substantial improvements, constitutes such part performance as to take the case out of the Statute of Frauds.[5] In this discussion we shall deal with the more substantial and difficult problem involved in these cases; namely, the character of the interest or ownership acquired by the donee. Is this interest purely equitable or legal? May the donee enforce it only by an equitable action for specific performance, or—what amounts to the same thing—by equitable counterclaim for specific performance, under code procedure; or, on the other hand, may he set it up in the legal action as a so-called "equitable" defense, i. e., merely as a defense and not by way of counterclaim asking relief?[6]

---

[3] As to what constitutes substantial improvements see Fry, *Specific Performance*, pp. 256-259; *Maddison v. Alderson* (1883) L. R. 8 App. Cas. 467.

[4] That the problem is not dominantly one under the Statute of Frauds becomes clear when we alter the facts by the substitution of a writing for the oral statement, on the strength of which the donee goes into possession.

[5] A few of the many cases in which specific performance by the donee was allowed are: *Lobdell v. Lobdell* (1867) 36 N. Y. 327; *Rowe v. Henderson* (1903) 4 Ind. T. 597; *Wilson v. Kruse* (1915) 270 Ill. 298; *Peters v. Jones* (1872) 49 Ia. 512; *Christensen v. Christensen* (1914) 265 Ill. 170. See Fry, *Specific Performance*, pp. 256-259; *Steevens Hospital v. Dyas* (1864) 15 Ir. Ch. 405.

[6] Equity seems to have developed the doctrine that a gratuitous promise by the donor becomes enforcible in equity because substantial improvements have been made in reliance upon it. *Freeman v. Freeman*

At common law, a defendant could not set up an equitable title as a defense to a legal action such as ejectment.[7] The holder of the equitable title was compelled to resort to a court of equity to commence another suit and to enjoin the first proceeding. Under the reformed procedure in England[8] and America, equitable defenses by way of counterclaim are now allowed in legal actions.[9] The code states, under the reformed procedure, have attempted to combine the elements of the old and the new procedure; equitable defenses are permitted in the same action by way of counterclaim or cross-demand.[10] The defendant, owner of an equitable title, is permitted in the same suit to turn his equitable interest into a legal estate and then interpose a legal defense to the action of ejectment.[11] The defense is to be viewed in the identical manner in regard to substance as if the same facts had been made the basis of a petition

(1870) 43 N. Y. 234; *Seavey v. Drake* (1882) 62 N. H. 393. When courts say the improvements are consideration for the promise, they are using consideration in a sense different from that ordinarily used by courts of law. Cf. expressions in the principal case: "The promise to give is no longer *nudum pactum*. It has become a promise upon a consideration, not a consideration moving to the promisor, but, nevertheless, one moving from the promisee."

[7] See Bliss, *Code Pleading*, sec. 347; Adams, *Ejectment*, p. 242; A. & E. Encyc. of Law, Vol. X, p. 533. The common-law procedure in this respect is still largely followed in Illinois. *Fleming v. Carter* (1873) 70 Ill. 286. In the federal courts the common-law rule was adhered to until recently. The principle of equitable estoppel was largely resorted to. *Kirk v. Hamilton* (1880) 102 U. S. 68; *Killian v. Ebinghaus* (1884) 110 U. S. 568.

[8] Since the Judicature Act of 1873.

[9] An equitable defense by way of counterclaim must be distinguished from the so-called equitable defense which is strictly based on equitable principles. The existence of a mere equitable interest has generally been considered as a power in the donee to invest himself with a good legal defense by counterclaim or cross-bill. Thus (1) a vendee or lessee in possession under a written contract, who has performed the terms of the agreement, has a good legal defense to an action of ejectment; (2) a vendee in possession under an oral agreement has only an equitable interest with no right to remain in possession unless he exercises his power to perfect his equitable interest into a legal estate; (3) a donee who has entered into possession and made improvements under a written or oral gift has an equitable interest with a corresponding power to acquire a legal defense.

[10] See Tyler, *Ejectment*, p. 69.

[11] Missouri has adhered to this procedure in a long series of cases; it would seem that affirmative equitable relief could never be granted to the defendant upon his mere answer. *Gott v. Powell* (1867) 41 Mo. 416;

to chancery for equitable relief. The requirements under the code procedure, as adopted by the great majority of the code states, are well illustrated by the case of *Zeuske v. Zeuske*.[12] Under a set of facts very similar to those of the principal case, it was held that under the Oregon code,[13] the defendant in an action of ejectment could defend his possession under an equitable title by means of a cross-bill only and not by answer.[14] Until a comparatively recent date Minnesota decisions have generally adhered to the principle that the holder of an equitable interest in real estate must seek affirmative relief in defending an action of ejectment.[15]

Minnesota has by its recent decision adopted a radical simplification. Under its present procedure an oral grantee, or oral donee who has gone into possession and materially altered his situation, is apparently regarded as having a so-called "equitable" defense to an action of ejectment by the owner of the legal title.[16] The defendant, in case of an oral gift, is, in effect, regarded as vested with legal ownership and with what is actually a legal

---

Harris v. Vinyard (1868) 42 Mo. 568; *State v. Meagher* (1869) 44 Mo. 356; *Anderson v. Scott* (1888) 94 Mo. 637.

The following states are substantially in accord with this doctrine: Wisconsin, Indiana, California, Iowa, Georgia and Oregon. See *Hammer v. Hammer* (1875) 39 Wis. 182; *Groves v. Marks* (1869) 32 Ind. 319; *Hartley v. Brown* (1873) 46 Cal. 201; *Walker v. Kynett* (1871) 32 Ia. 524; *Grace v. Means* (1907) 129 Ga. 638; *South Portland Land Co. v. Munger* (1900) 36 Or. 457.

The cases in New York and Nebraska do not adhere to a single policy and are somewhat confusing. For these cases, see note 24, *infra*.

[12] (1909) 55 Or. 65. See note in 1912A Ann. Cas.

[13] B & C. Comp. secs. 391, 392.

[14] A cross-bill has long been recognized by the Oregon courts as an appropriate remedy by which an equitable interest may be made available as a defense. See *Hatcher v. Briggs* (1876) 6 Or. 31; *South Portland Land Co. v. Munger, supra.*

[15] *Freeman v. Brewster* (1897) 70 Minn. 203: "The rule which has prevailed in this jurisdiction since 1860 is that the holder of an equitable title to real property in an action to determine the right of possession must allege his equities in his pleadings so fully and completely that a court of equity would under the old practice have granted him adequate relief, and awarded him possession or confirmed his right of possession against the holder of the adverse legal title." See also *Williams v. Murphy* (1875) 21 Minn. 534; *Merrill v. Dearing* (1891) 47 Minn. 137; *Jorgensen v. Jorgensen* (1900) 81 Minn. 428. See ejectment under the Minnesota practice in Tyler, *Ejectment*, pp. 721-727.

[16] *Hayes v. Hayes* (1914) 126 Minn. 389, seems to be the earliest case to have announced the new procedure. In *Trebesch v. Trebesch* (1915) 130

defense. The case of *Hayes v. Hayes*,[17] which seems to have originated the new doctrine, contains this significant passage:

> "It is claimed that it was error to admit any testimony as to an executed parol gift because the question was not raised by the pleadings. *The answer pleaded that Matthew Hayes was at the time of his death lawfully seized of the premises and that he had good and sufficient title thereto. We hold the pleading sufficient* to permit the defense of title by parol gift accepted and executed. We also hold that this was a defense that could be made and litigated in this action of ejectment, though it is a claim that is usually litigated in an action for specific performance."[18]

As in the principal case, the entire matter was left to the jury, to determine whether there had been a present executed gift.[19] Under the Minnesota procedure it is no longer imperative to ask for affirmative relief[20]; it has become entirely unnecessary and superfluous.

A principle very largely in harmony with the Minnesota procedure has been advocated by Pomeroy.[21] While the contention of Pomeroy is not altogether clear, he appears to urge that the owner of an equitable title in the land should be permitted to interpose his equitable interest as a defense in an action to regain the possession: the distinction between defenses made available through affirmative action and that interposed by way of answer he considers as unimportant.[22] Bliss[23] apparently takes issue

---

Minn. 368, by a dictum, the difficulty of the Minnesota doctrine is revealed in a case, where the plaintiff was induced to take a lease from the defendant's guardian, of the premises he had received by oral gift, under the belief that he had no title without documentary evidence.

[17] (1914) 126 Minn. 389, 394.

[18] The italics are the writer's.

[19] Expression used in principal case.

[20] Required by the court in *Zeuske v. Zeuske, supra.*

[21] *Remedies and Remedial Rights* (3d ed.) secs. 87-106.

[22] Note these characteristic passages: "A defense is not to be conceived of as the means of acquiring positive relief or any remedy, legal or equitable. If the defendant is allowed the affirmative relief of securing a judgment then it ceases to be a defense and becomes in turn a cause of action. . . . A defense is a negative resistance, an obstacle, a something which prevents a recovery, whether it be legal or equitable."

Pomeroy has evidently failed to recognize that a donee or oral grantee has no actual equitable defense entitling him to possession, but only a power to perfect his equitable interest into legal ownership.

[23] Bliss, *Code Pleading*, secs. 347-351.

with Pomeroy on this subject. He clearly propounds the generally accepted view that unless the defendant has such an equity in the land as to entitle him to the possession, then his defense depends upon his ability to establish his right to a conveyance; that must be sought by a counterclaim, as formerly by a bill for specific performance. The defense is entirely dependent upon his successs in prosecuting such counterclaim or cross-bill.[24]

The Minnesota doctrine represents a merger of law and equity, whereby the donee is regarded as vested with a legal interest sufficient to defeat an action of ejectment by the donor. The donee or oral grantee is accorded a so-called "equitable" defense (actually a legal defense), instead of a privilege and a power to establish a legal defense through equitable counterclaim.[25] Minnesota decisions have undoubtedly been greatly influenced by the code procedure, in effecting so complete a blending of legal and equitable principles. In other jurisdictions judge and jury continue to function respectively in the field of equity and law questions involved in these suits. The shifting of responsibility from judge and jury exclusively to the jury is a widely significant departure.[26] Not only has there been effected a con-

---

[24] Pomeroy relies to some extent upon the case of *Dobson v. Pearce* (1854) 12 N. Y. 156. The case does not, however, fully support his theory. The opinion of the court is not clear, but it appears to hold that a Connecticut decree declaring that a New York money judgment had been obtained by fraud, might be set up as a defense to the action at law brought on the original money judgment; the fraud being regarded as a defense only as established by the decree. For a full discussion of the principles involved in this case, see Professor Walter W. Cook, Powers of Courts of Equity (1915) 15 COL. L. REV. 247. For cases more nearly upholding Pomeroy, see *Hoppough v. Struble* (1875) 60 N. Y. 430 (dicta); *Crary v. Goodman* (1855) 12 N. Y. 266. But see contrary opinion on the same case in lower court (1851) 9 Barb. (N. Y.) 657. Cf. *Dale v. Hunneman* (1881) 12 Neb. 221.

[25] It is not clear whether the legal title is regarded as vesting in the donee or grantee when possession is first taken. If held to vest retroactively then Minnesota has evolved a theory whereby the donee or grantee gets legal title through a mode of livery of seisin.

[26] In this connection, note remarks of Pomeroy, *Equity Jurisprudence* (3d ed.) sec. 116: "The reformed American procedure has attempted to combine the two, or rather to enlarge the equity rules and doctrines, so that they may embrace all actions, legal as well as equitable. A complete amalgamation, however, is not possible as long as the jury trial is maintained in legal actions."

siderable alteration in procedure, but concomitantly a change in substantive law has resulted.[27]

B. L.

RESCISSION OF A STOCK DIVIDEND ALREADY DECLARED, AND RESULTING JURAL RELATIONS

The rule that cash dividends once declared and published are irrevocable is well established,[1] but a new situation has arisen in the recent case of *Staats v. Biograph Co.*[2] In this case a dividend of stock, having been declared and published, was rescinded. The declaration and publication of a cash dividend creates certain duties to pay a sum certain which constitutes a debt at common law. The resolution in the instant case created no debt, as it reserved to the directors the option of paying in cash or paying in stock. Such an obligation is not an obligation to pay a sum certain. Where one is bound by a covenant to do one of two things, then, in an action by the covenantee, the measure of damages is estimated by the loss engendered by a failure to do that which is least detrimental. The court followed this theory, citing *Robinson v. Robinson.*[3]

A stock dividend may properly be declared in two different cases. First, a corporation, instead of distributing its surplus in the form of cash dividends, may in accordance with state statutes add to the amount of its capital, and distribute the shares representing the increase among the shareholders. The property of the corporation is not increased or diminished by such a dividend.[4] Second, a stock dividend may be declared payable in

---

[27] Compare the development that has occurred with respect to the interest acquired by the holders of easements under oral licenses and oral agreements. See note in (1911) 25 HARV. L. REV. 191; *Gilmore v. Armstrong* (1896) 48 Neb. 92; *Uncanoonuck Road Co. v. Orr* (1893) 67 N. H. 541; *Arbaugh v. Alexander* (1911) 151 Ia. 552.

[1] Morawetz, *Corporations,* Vol. I, sec. 445: "A dividend properly declared by the directors of a corporation cannot subsequently be revoked. Those persons who were shareholders on the books of the company at the time when the dividend was declared have a legal claim against the company for the payment of the amount of the dividend." See also Taylor, *Corporations* (5th ed.) sec. 568; Machen, *Modern Law of Corporations,* Vol. II, sec. 1358; Marshall, *Corporations,* sec. 283.

[2] (1916) 236 Fed. 454.

[3] (1851) 1 De G. M. & G. 247.

[4] *Green v. Bissell* (1907) 79 Conn. 547; *Williams v. W. U. Tel. Co.* (1883) 93 N. Y. 162.